



July 8, 1999

The Honorable Tom Bliley  
Chairman, Committee on Commerce  
United States House of Representatives  
Room 2125 Rayburn House Office Building  
Washington, DC 205 15

Dear Chairman Bliley:

I am writing to respond to your letter to Secretary Daley dated June 22, 1999, in which you express concern about recent steps taken by the Internet Corporation for Assigned Names and Numbers ("ICANN") related to the transition to privatized management of the Internet Domain Name System ("DNS").

The Department of Commerce welcomes the Committee's continuing interest in this process. As you point out in your letter, we share the same goal: transitioning DNS management responsibility to a new, not-for-profit corporation "governed on the basis of a sound and transparent decision making-process, which protects against capture by a self-interested faction." To this end, Department staff has regularly met with the Committee staff to provide information and to seek Congressional input concerning this complex process.

Before turning to the specific questions posed in your letter, I thought it would be useful to provide a more general report on the status of the DNS transition process.

### **Summary**

The Commerce Department's Statement of Policy on the *Management of Internet Names and Addresses* (the "White Paper"), issued thirteen months ago, identified a number of tasks to be undertaken on a priority basis in order to transition DNS management to the private sector: (1) private sector creation and organization of a new, not-for-profit corporation to conduct DNS management; (2) rapid introduction of competition in the provision of domain name registration services; (3) adoption of policies to reduce conflicts between trademark holders and domain name registrants; and (4) review of the root server system to increase the security and professional management of that system.

## Creation and Organization of New Corporation

ICANN has made considerable progress toward establishing the structures for representative decision making contemplated in the White Paper, but there is still important work to be done:

- 0 ICANN's top priority must be completing the work necessary to put in place an elected board of directors on a timely basis. Specifically, it must do everything within its power to establish the Supporting Organizations, and ensure the election of nine board members by those Organizations to begin serving at the November 1999 Board Meeting. And it must work diligently to complete the process for electing at-large directors by June 2000. (Page 11)
- 0 ICANN should eliminate the \$1 per-year per domain name registration user fee. Although the user fee may be determined to be an appropriate method for funding ICANN's activities, it has become controversial, and we believe a permanent financing method should not be adopted until after the nine elected members are added to the ICANN Board in November. That will ensure that this important decision is made in accordance with the representative, bottom-up process called for in the White Paper. In the meanwhile, we will work with ICANN and the entire Internet community, to the extent permitted by law, to obtain interim resources for ICANN. (Page 11)
- ICANN should immediately open its board meetings to the public. Transparency is critical to establishing trust in decision making. And trust is essential for ICANN's ultimate success. As a general matter, ICANN has undertaken the vast majority of its work in an open and transparent manner. The final step of opening the board meetings is critical to establishing trust in ICANN. (Page 12)
- There is concern in the Internet community about the possibility of over-regulation, and therefore ICANN should assure all registrars and registries, through contract, that it will restrict its policy development activities to matters that are reasonably necessary to achieve the goals specified in the White Paper and that it will act in accordance with the procedural principles set forth in the White Paper. (Page 17)

With these actions, and the other steps already taken by ICANN, we believe that ICANN will put itself on a very firm footing to achieve the goals and principles spelled out in the White Paper.

## Introduction of Competition in Domain Name Registration

Again, there has been considerable progress: the Shared Registration System (SRS) has been created; new registrars have been accredited under guidelines established by ICANN; NSI has licensed the SRS to those registrars on an interim basis; and testing of the SRS has begun. But significant work still remains to be done in order to establish robust competition:

- NSI must fulfill its obligation to recognize ICANN. This requires NSI and ICANN to reach agreement on a number of contractual issues. The transition of DNS management

to the private sector can succeed only if all participants in the domain name system – including NSI – subject themselves to rules emerging from the consensus based, bottom-up process spelled out in the White Paper.

- With respect to NSI's provision of registry services – as to which an unsupervised NSI would be able to exercise market power today and for the foreseeable future – we believe the NSI-ICANN agreement must assure reasonable supervision to prevent the exercise of that market power in a way that injures consumers. With respect to NSI's provision of registrar services, robust competition in the provision of those services – and the lower prices and greater choice that are the benefits of competition – cannot occur until all purveyors of those services abide by the same rules. (Page 14)

But what if an agreement cannot be reached? NSI's view is very clear. Its position is that when Cooperative Agreement terminates, whether prematurely or upon its expiration on September 30, 2000 NSI will be free to operate these domains without any supervision by the Government. The Commerce Department believes just as strongly that NSI does not have the legal right to operate these domains in the authoritative root in perpetuity. We believe that all or part of the functions now performed by NSI under the Cooperative Agreement could be reassigned through a competition and, unless NSI won the competition, it would cease to have any legal right to provide the recompeteted services. And even if that were not so, an NSI unconstrained under US law would quickly become a target of action by other countries in order to protect consumers against the exercise of market power. (Page 18)

This path – failure to reach agreement with ICANN, recompetition of the Cooperative Agreement and the likely results that would follow, together with action by foreign governments – would be extremely destabilizing for the Internet and therefore quite harmful to its development. We have been able to reach agreement with NSI in the past each time it has been necessary to do so in order to enable the DNS process to move forward. There is no reason to believe that agreement cannot be reached on the remaining questions. We believe all parties should put aside inflammatory rhetoric, set aside parochial concerns, and work for a fair solution that is in the interest of the entire Internet community. (Page 19)

- NSI and the Department of Commerce must reach agreement on a post-Testbed license for registrars' use of the SRS. Remaining issues include modification of the SRS to allow registrars to offer different term lengths (and thus compete on this basis in addition to price); and allowing registrants to switch registrars without forfeiting the time remaining on an existing registration contract, upon payment of a cost-based transfer fee (the current system requires the transferring registrant to forfeit all time on its existing registration and pay an additional two-year fee). We are very concerned that imposing this monetary penalty on transfer of existing registrations among registrars creates a barrier to robust competition. We also must reach agreement on the size of the per-registration fee to be

paid to NSI as registry. (Page 20)

- NSI and the Department of Commerce also must resolve issues regarding the availability of the WHOIS database, and the .com, .net, and .org zone files. NSI took certain actions earlier this year without the consent of the Commerce Department that restricted access to this information, which had previously been widely and readily available to the Internet community. We strongly support the prohibition of uses that adversely affect the operational stability of the Internet, but we oppose other restrictions on third-party use of this information, which has been compiled by NSI in the course of its operations under the authority of the U.S. Government. (Page 21)
- The Commerce Department and NSI also must reach agreement concerning the appropriate use of the InterNIC.net website. (Page 22)

### Domain Names and Trademarks

- The provisions of the ICANN Accreditation Agreement, together with the recommendations of the World Intellectual Property Organization (WIPO) when fully implemented, reflect the recommendations of the White Paper related to reducing friction between trademark owners and domain name holders. We commend ICANN for its prompt action on these issues, and urge it to proceed promptly, pursuant to the appropriate ICANN procedures, to establish a uniform dispute resolution procedure for cybersquatting. (Page 23)

### Management of the Root Server System

- The Department of Commerce and ICANN are proceeding to implement the White Paper's call to develop and implement means to increase the security and professional management of the Internet root server system. (Page 24)

#### **A. Background**

The Internet we know today grew rapidly from its origins as a United States government research project into an international medium for commerce, education, and communication. When the application known as the World Wide Web was launched, the information riches of the Internet became readily accessible to non-technical end-users. No longer an exclusive province of computer scientists, a broad range of interests -- commercial, non-profit, educational, and other -- joined the Internet community and began using the Internet to communicate, to exchange ideas and information, and to conduct commerce.

When the Administration began its review of electronic commerce issues in 1996, there were two existing governmental mechanisms for coordinating the DNS. Those government mechanisms consisted of (1) a cooperative agreement between the National Science Foundation (NSF) and Network Solutions, Inc. (NSI) for managing the generic top level domains (gTLDs) (the Cooperative Agreement), and (2) a contract between the Defense Advanced Research Projects-

Agency (DARPA) and the Information Sciences Institute (ISI) at the University of Southern California under which the ISI performed a number of management and policy coordination functions collectively known as the Internet Assigned Numbers Authority (IANA). By early 1997, it was clear that although these mechanisms had adequately managed the system in its early years, each had inherent limitations that could create a drag on the growth of the Internet.

With respect to technical and policy coordination, IANA functioned ably for years under the leadership of the late Dr. Jon Postel. Dr. Postel was a well respected technologist, skilled in the art of conflict resolution as well. As the Internet community became increasingly diverse, however, and as the disputes became commercial in nature, it became unworkable to rely on a single individual to coordinate the domain name system. Dr. Postel recognized this and initiated an international discussion, called the International Ad Hoc Committee (IAHC) in September of 1996. The IAHC process led to the creation of the gTLD Memorandum of Understanding (gTLD MOU). The Administration was concerned that the gTLD MOU relied too heavily on international governmental bodies and did not enjoy adequate support from the commercial community and other private sector communities.

The Cooperative Agreement between NSF and NSI made NSI the exclusive provider of registration services in the .com, .net, and .org gTLDs, encompassing both management of what we now refer to as the central database, or “registry” function, as well as serving as the interface with individual domain name registrants, the “registrar” function. Initially, NSF paid NSI to perform these tasks. Beginning in 1995, however, NSF authorized NSI to charge \$70 for a two-year registration.

For a number of reasons, primarily having to do with the global nature of the Internet, .com, .net, and .org today enjoy a dominant position in the most commercially valuable Internet registrations.<sup>1</sup> Registrations in .com, .net and .org account for nearly 75% of all third level domain name registrations.\* Put simply, a .com, .net, and .org domain name today is the overwhelming choice for entities launching commercial and non-profit Internet applications designed to appeal to a multinational audience. In more conventional economic terms, registering a name in these domains is so commercially attractive that an exclusive provider of registry or registrar services for these domains would be able to exercise market power in dictating the terms for the provision of those services, because its terms are not likely to be subject to competition from alternative name registration options. Whether or not competition will develop in the future is not possible to predict, but today – and for the reasonably

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<sup>1</sup> In addition to the gTLDs there are over 200 country-code top level domains (ccTLDs) that might have been expected to provide some competition. But relevant data indicate that the ccTLDs have not yet presented a serious challenge to the commercial dominance of the gTLDs. For example, even the largest ccTLD, .de (Germany) accounts for only 4% of all registered domains. Source: NetNames Ltd. <http://www.netnames.com>.

<sup>2</sup> Source: NetNames Ltd. <http://www.netnames.com>.

foreseeable future – there simply is no competitive alternative.

Consumers and businesses around the world began to complain about the absence of competition in this lucrative domain name registration market. Governments around the world complained that it was inappropriate that these services were available exclusively through a monopoly created and controlled by the United States government.

Thus, when the Administration began work on DNS privatization there was widespread disapproval of the then-current DNS management structure, and change was clearly needed to address a number of issues:

- There was widespread dissatisfaction about the absence of competition in domain name registration.
- Conflicts between trademark holders and domain name holders had become increasingly common, and mechanisms for resolving these conflicts were expensive and cumbersome.
- Commercial users, many of whom were staking their future on the successful growth of the Internet, were calling for a robust and professional management structure.
- An increasing number of Internet users resided outside the United States, and they desired increased participation in the formulation of policy related to the management of the DNS.
- Continued direction and funding of DNS activities by U.S. research agencies was becoming inappropriate, given the increasingly global and commercial nature of the Internet.

On July 1, 1997, the President released *A Framework for Global Electronic Commerce* and directed the Secretary of Commerce to privatize the management of the DNS in a manner that increases competition and facilitates international participation in its management.

On June 5, 1998, the Department of Commerce issued a Statement of Policy entitled *Management of Internet Names and Addresses* (the “White Paper”).<sup>3</sup> The White Paper was the product of an extensive public consultation process that included a Request for Comments (RFC), on which the Department received more than 430 comments, and a discussion draft entitled *A Proposal to Improve the Technical Management of Internet Names and Addresses* (the “Green Paper”), on which the Department received more than 650 comments.<sup>4</sup> In addition to conducting a careful review of the comments received on the RFC and the Green Paper, the Administration consulted extensively with a wide variety of members of the Internet community

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<sup>3</sup> Tab 1.

<sup>4</sup> The RFC, the Green Paper, and public comments on these documents are posted online at [www.ntia.doc.gov/ntiahome/domainname/domainhome.htm](http://www.ntia.doc.gov/ntiahome/domainname/domainhome.htm).

including Internet engineers, businesses using the Internet, intellectual property holders, civil liberties advocates, non-commercial domain name holders, Internet users, and governments around the world. The Department of Commerce also consulted with Congress, and participated in three Congressional hearings.

The White Paper, reflecting the views of the overwhelming majority of commenters, called upon the private sector to create a new, not-for-profit corporation to assume responsibility, over time, for the management of certain aspects of the DNS. The White Paper identified four specific functions to be performed by this new corporation:

- To set policy for and direct the allocation of Internet protocol (IP) number blocks;
- To develop overall policy guidance and control of top level domains (TLDs) and the Internet root server system;
- To develop policies for the addition, allocation, and management of gTLDs, the establishment of domain **name** registries and domain name registrars and the terms, including licensing terms, applicable to new and existing gTLDs and registries under which registries, registrars, and gTLDs are permitted to operate;
- To coordinate maintenance and dissemination of the protocol parameters for Internet addressing.

The White Paper also articulated the fundamental policies that would guide United States participation in the transfer of DNS management responsibility to the private sector: stability; competition; private, bottom-up coordination; and representation.

The White Paper listed a number of tasks to be undertaken on a priority basis.

First, the creation and organization of a new, not-for-profit corporation to manage the DNS. The White Paper anticipated the need for an interim or initial (the terms are used interchangeably) Board of Directors of the new, not-for-profit corporation to carry out specific tasks expeditiously. The interim board was to establish a system for electing the Board of Directors the new corporation and complete its organization in accordance with the White Paper principles.

Second, the White Paper identified as a high priority the rapid introduction of competition in the provision of domain name registration services. The interim board of the new corporation was to develop policies for the addition of new TLDs and to establish qualifications for domain name registries and registrars. The Department of Commerce committed to enter into an agreement with NSI by which NSI would agree to take specific actions, including commitments as to pricing and equal access, designed to permit the development of competition in domain name registration and to approximate the conditions that would be expected in the presence of marketplace competition.

Third, the White Paper recommended that the new corporation promptly adopt specific policies designed to reduce conflicts between trademark holders and domain name

registrants. The White Paper indicated that the United States would ask the World Intellectual Property Organization (WIPO) to convene an international process to develop a set of recommendations on these matters to be presented to the Interim Board for its consideration as soon as possible.

Fourth, the White Paper committed the United States to undertake a review of the root server system to recommend means to increase the security and professional management of the system. The recommendations of this study were to be implemented as part of the transition process, and the new corporation was to develop a comprehensive security strategy for DNS management.

The following is an examination of progress made to date, and work remaining to be done, in each of these areas.

## **B. Private Sector Creation and Organization of the New Corporation**

The White Paper's call for private sector creation of a new, not-for-profit corporation to manage DNS issues resulted in five separate submissions, each of which was posted by NTIA for comment.<sup>5</sup> The submissions and comments received evidenced clear support for moving forward with the submission of the IANA on behalf of the Internet Corporation for Assigned Names and Numbers (ICANN). On October 20, 1998, NTIA wrote to ICANN noting the public support for moving forward with the ICANN model! NTIA's letter also cited a number of specific concerns raised by commenters, and asked ICANN to address these concerns. Following receipt of a revised ICANN submission,<sup>6</sup> the Department of Commerce entered into a Memorandum of Understanding with ICANN for collaborative development and testing of the mechanisms, methods, and procedures necessary to transition management responsibility for specific DNS functions to the private sector.<sup>7</sup> The MOU constituted recognition of ICANN as the new, not-for-profit corporation for DNS management and specifically contemplated ultimate transition of management responsibility to ICANN. Consistent with the White Paper approach, however, any such transition would occur over time as the corporation becomes operational and stable.

Also in October of 1998, the Department of Commerce and NSI amended the Cooperative Agreement to facilitate the stable evolution of the domain name system in accordance with the

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<sup>5</sup> These submissions, and public comment on them, are posted at [www.ntia.doc.gov](http://www.ntia.doc.gov).

<sup>6</sup> Tab 2.

<sup>7</sup> Tab 3.

<sup>8</sup> Tab 4.

White Paper. Amendment 11 to the Cooperative Agreement<sup>9</sup> had four specific purposes, including “the recognition by NSI of the new, not-for-profit corporation when recognized by the U.S. Government in accordance with the White Paper.” Because Amendment **11** was executed on October 7, 1998, prior to the Department of Commerce’s recognition of ICANN on November 25, 1998, the new not-for-profit corporation was referred to in Amendment 11 as “NewCo.” Amendment 11 also extended the Cooperative Agreement through the transition period (until September 30, 2000) but specifically provided that as the United States Government transitioned DNS responsibilities to ICANN, corresponding obligations under the Cooperative Agreement would be terminated and, as appropriate, covered in a contract between NSI and ICANN.

### **1. Progress on Organization of ICANN and Election of Board of Directors**

ICANN’s achievements are very impressive, especially given the difficulty in creating a new organization to represent the multifaceted Internet community. Over the past seven months it has made steady progress in establishing structures for the representative, bottom-up processes contemplated in the White Paper.

ICANN’s submission to the Department of Commerce, which included its Bylaws and Articles of Incorporation, contemplated the creation of three policy development bodies, called “supporting organizations” or “SOs.” Half of the elected board, or nine members, were to come from the SOs.<sup>10</sup>

In keeping with the principle of private, bottom-up coordination, the SOs were to be self-forming bodies.

- On March 4, 1999, ICANN provisionally recognized the first SO, the Domain Name Supporting Organization (DNSO). The DNSO is comprised of seven separate constituency groups, and on May 27, 1999, ICANN recognized six of the DNSO’s seven initial constituencies; recently the final initial constituency -- non-commercial domain name holders -- released a compromise organizational document.
- ICANN has received a consensus proposal for the formation of the Protocol Supporting Organization, which it expects to recognize at its next meeting in

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<sup>9</sup> Tab 5.

<sup>10</sup> On December 21, 1998, ICANN posted guidance on the preparation and submission of proposals for the three supporting organizations (SOs). The ICANN guidance called for the SOs to be self-organizing, in keeping with the White Paper principle of bottom-up decision making. As a result, organization of each of the SOs has proceeded at a pace not within ICANN’s control. ICANN has acted, however, upon request of the organizers, to facilitate SO formation.

August.

Organizers of the Address Supporting Organization have not reached agreement on a consensus proposal, although we understand that progress is being made. It is hoped that a consensus proposal will emerge prior to ICANN's August meeting.

As a result of the progress on SO formation, ICANN is expected to add nine new, elected members to the Board of Directors by the time it meets in Los Angeles on November 2, 1999.

In response to Internet community consensus that some members of the board should be elected by a vote of ICANN members, ICANN revised its Bylaws to require the election of nine At-Large Directors. The ICANN Board has taken the following steps to implement a system for electing At-Large Directors:

- As one of its first actions, ICANN created a Membership Advisory Committee (MAC) to develop recommendations for a membership structure that would elect its nine At-Large Directors (and thus replace the initial or interim board with elected board members).
- The MAC submitted its recommendations for an open membership structure in May, 1999.
- ICANN staff will report in August on the administrative requirements, cost, outreach, and logistical requirements of implementing the MAC recommendations.

## **2. Progress Towards Implementation of Additional Assurances with Respect to Due Process**

The ICANN bylaws commit the corporation to develop an independent review process, to provide an additional check on actions taken by the corporation that are not consistent with its Articles of Incorporation and Bylaws. On March 31, 1999, ICANN announced the creation of an Independent Review Advisory Committee with representatives from seven countries. This committee is charged to advise ICANN on creation of a structure for independent third party review of ICANN decisions. It has already begun its work and is expected to report at the August meeting.

## **3. Important Remaining Tasks**

ICANN has accomplished much in the seven months since it was recognized by the Department of Commerce at the end of 1998, but there is still more work to be done. The Department wrote to ICANN on July 8, 1999, suggesting that ICANN take several specific steps in order to implement appropriately the principles set forth in the White Paper." These suggestions are summarized below:

a. ***Complete ICANN organizational structure and elect Board of Directors***

As indicated above, ICANN is moving towards completion of its organizational structure and Board election process. It is critical that ICANN do everything within its power to finalize the organization of the SOs and produce nine elected board members by November.

The Department of Commerce also expects the ICANN Board to move expeditiously to establish a process and time-line for electing At-Large Directors. This task must be ICANN's highest priority. Indeed, we can think of very little that is more important to the success of this experiment in self-ordering than the prompt establishment of a fully elected Board of Directors. At the same time, we believe that no good will be served by moving forward on elections without appropriate structural safeguards to prevent capture and/or election fraud. We have called on ICANN to complete this process by June 2000.

b. ***Following the Addition of Elected Board Members in November, adopt a comprehensive self-funding arrangement based on fair and transparent funding mechanisms***

The White Paper stated that the new not-for-profit corporation should be funded by Internet stakeholders, including registries and registrars. ICANN concluded that it should initially finance its operations through a payment by registrars of a user fee of \$1 per year per domain name registered. This payment obligation was included in the accreditation agreement formulated by ICANN after notice, opportunity to comment, and a public meeting.\*

In recent weeks the user fee has become controversial. Although the \$1 fee may be determined to be an appropriate method for funding ICANN activities, and we believe such a fee would be lawful,<sup>13</sup> we believe that ICANN should eliminate the fee. Adopting a permanent financing system is an important step that, we believe, should await the addition of the nine elected Directors in November. That will ensure that this important decision is made through a representative, bottom-up process.

To date, ICANN has been funded through corporate contributions and extensions of credit. In the short term our recommendation means that ICANN must receive government funding, continue to rely on corporate contributions, or finance itself through some combination of both sources. We pledge to work with ICANN and the entire Internet community, to the extent permitted by law, to secure interim resources for ICANN.

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<sup>12</sup> The draft Accreditation Guidelines, including a draft Accreditation Agreement, was posted by ICANN for public comment on February 8, 1999. These drafts, and the public comments submitted, can be found on the ICANN web site, at [www.icann.org](http://www.icann.org).

<sup>13</sup> This is discussed in greater detail below.

**c. *Implement Procedures Designed to Enhance Transparency and Ensure Due Process***

To date, all ICANN Board meetings have provided for a day of public input into key questions that have been posted online in advance. This public input has then been followed by a day in which the Board meets in closed session, discusses the issues in light of the public input, and then makes decisions. Minutes of the meetings have been provided promptly, but the discussions have not been made public. At this important time, when the process is still evolving and the creation of public trust is crucial to the success of ICANN, we also recommend that ICANN immediately open its board meetings to the public. The Board must, of course, retain the ability to close its meetings when proprietary, confidential, personnel, or litigation-related matters are being discussed.

**C. Introduction of Competing Registrars in .com, .net and .org**

One of the principal short-term goals identified in the White Paper is the introduction of competition in the provision of domain name registration services. Under the MOU with ICANN and Amendment 11 to the Cooperative Agreement with NSI, the Department of Commerce, ICANN, and NSI all are required to participate in opening the gTLDs currently administered by NSI under the Cooperative Agreement to multiple registrars who would compete with one another in providing services to new and existing domain name registrants. Amendment 11 provided for the development, deployment, and licensing by NSI (under a license agreement to be approved by the Department of Commerce) of a mechanism to allow multiple registrars to submit registrations for the gTLDs for which NSI now acts as the registry. This system is known as the Shared Registration System, or SRS. Under the MOU, ICANN is called upon to accredit competing registrars (Accredited Registrars, as identified in Amendment 11) through development of an accreditation procedure that subjects such registrars to consistent requirements designed to promote a stable and robustly competitive DNS.

**1. Progress with Respect to the Introduction of Competition**

Considerable progress has been made toward introducing competition, but a number of serious issues remain unresolved.

**a. *ICANN's Adoption of Registration Accreditation Guidelines and Selection of Registrars***

On February 8, 1999, ICANN issued proposed guidelines for the selection and accreditation of registrars in the .com, .net, and .org domains. The accreditation guidelines (Guidelines), which included a draft agreement between ICANN and Accredited Registrars (the Accreditation Agreement) addressed financial and business qualifications, privacy and security issues, the provision of up-to-date registration information, the need for prepayment of registration fees, and other items. The Guidelines also specifically provided that Accredited Registrars would implement trademark dispute resolution policies when and if such policies were adopted by ICANN.

All of the issues contained in the Guidelines and the Accreditation Agreement, with the exception of privacy issues, were explicitly contemplated in the White Paper. With respect to privacy, the Guidelines and the Accreditation Agreement require Accredited Registrars to notify registrants how their information would be used, consistent with Administration policy calling for **self-regulation** to ensure effective privacy protection on the **Internet**.<sup>14</sup>

ICANN received comments from over 50 individuals and entities, and devoted a portion of its open meeting on March 3, 1999, to the guidelines. The guidelines were revised and adopted by ICANN on the basis of this public **input**.<sup>15</sup>

On April 21, 1999, ICANN selected five Accredited Registrars to participate in Phase I testing of the SRS (the Testbed). Fifty-two additional registrars have been approved for accreditation by ICANN to compete once the **Testbed** phase is completed, currently scheduled for July 16, 1999.<sup>16</sup> NSI agreed in April to permit post-testbed registrars to receive **SRS** software in order to begin work prior to the completion of the **testbed**. The Department of Commerce has communicated extensively and directly with registrars accredited by ICANN.

**b. *NSI's Development of the SRS and its Interim Licensing Agreement***

Pursuant to Amendment 11 of the Cooperative Agreement, NSI developed the SRS software to carry out its functions as registry for .com, .net and .org. The SRS allows multiple registrars to submit domain name registrations to the registry for the .com, .net and .org domains.

On April 21, 1999, the Department of Commerce approved **NSI's License and Agreement with Accredited Registrars for use during the Testbed period.**" This agreement established a **Testbed** price cap for registry services (the price charged by NSI to registrars) of \$18 for a two-year registration.

NSI and the Department of Commerce continue to discuss the terms of the post-testbed NSI License and Agreement with Accredited Registrars. The open issues are discussed in greater detail below.

**c. *Testing of the SRS is Underway***

Following ICANN's designation of the **Testbed** Registrars on April 21, 1999, progress in testing

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<sup>14</sup> The Guidelines also provided for the \$1 fee, discussed above.

<sup>15</sup> Tab 7.

<sup>16</sup> Tab 8.

<sup>17</sup> Tab 9.

the SRS was slow. Some of the delay is attributable to implementation glitches, design problems, and other problems that seem to be inevitable in this business.\*\* We continue to monitor the situation and believe that progress is being made on system testing. At this point, three of the Testbed Accredited Registrars are performing live registrations, but only one has been doing so for more than a week. In order to subject the SRS to vigorous testing, therefore, it will be necessary to extend the Testbed period.

## 2. **Important Remaining Tasks**

Significant work remains to create an environment that permits full and fair competition among registrars in .com, .net and .org.

### a. ***NSI and ICANN must reach agreement on the terms under which NSI fulfills its obligation to recognize ICANN***

NSI specifically agreed in Amendment 11 to the Cooperative Agreement to enter into a contract with the not-for-profit corporation recognized by the United States Government pursuant to the White Paper, and agreed that the corporation would have the authority to carry out its responsibilities under the White Paper. The purpose of the recognition requirement in Amendment 11 is twofold: first to obligate NSI to follow through on its public commitment to cooperate with and participate in the implementation of the White Paper; and second, to ensure that NSI's activities as a registry and as registrar would be subject to rules emerging from the consensus based, bottom-up process spelled out in the White Paper.

It is worth briefly summarizing the relevant provisions of Amendment 11. Network Solutions agreed to recognize NewCo "when recognized by the USG in accordance with the provisions of the Statement of Policy." (Purpose clause). Network Solutions further committed to enter into a contract with NewCo, and acknowledged "that NewCo will have the authority, consistent with the provisions of the Statement of Policy and the agreement between the USG and NewCo, to carry out NewCo's Responsibilities." (NewCo Clause). Under Amendment 11, NewCo's Responsibilities specifically include the establishment and implementation of DNS policy and the terms, including licensing terms, applicable to new and existing gTLDs and registries under which registries, registrars and gTLDs are permitted to operate." (Assistance to NewCo clause and "Transition" Section of White Paper.)

The key question, of course, is what the terms of the NSI-ICANN agreement should be.

With respect to NSI's provision of registry services – as to which an unsupervised NSI would be able to exercise market power today and for the foreseeable future – we believe the agreement must assure reasonable supervision (similar to that under the Cooperative Agreement) to prevent the exercise of that market power in a way that injures consumers. **After** all, the whole purpose of

the introduction of competition is to provide lower prices and greater choice for consumers. Based on the principles of the White Paper and Amendment 11 spell out the relevant principles. For example:

- The operations of a registry and of a registrar, if conducted by the same entity, should be separated so revenues and assets of the registry are not utilized to financially advantage registrar activities to the detriment of other registrars.
- The price to be paid by registrars for each domain name registration to the registry should reflect demonstrated costs and a reasonable rate of return.
- Access to the registry should be provided on a non-discriminatory basis.

With respect to NSI's provision of registrar services, robust competition in the provision of registrar services – and the lower prices and greater choice that attend such competition – cannot occur until all purveyors of those services abide by the same **rules**.<sup>19</sup>

We believe that the appropriate rules for registrars are embodied in the ICANN Accreditation Agreement. Of course, there is always room for improvement and a number of stakeholders have made good suggestions for fine-tuning the Accreditation Agreement, which we continue to consider

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<sup>19</sup> The basic set of uniform rules for registrars necessary to ensure the stability and smooth operation of the Internet, the components of which were articulated in the White Paper, include:

1. Registrar commitment to gather and provide public access to specified, accurate and up-to-date information from domain name registrants;
2. Registrar commitment to escrow that data in order to ensure that domain name registrants can continue to be serviced in the event that the registrar becomes unable to do so;
3. Registrar commitment not to activate a domain name registration unless and until it has received a reasonable assurance of payment for the registration;
4. Registrar commitment to bind registrants by contract to provide specified, accurate and up-to-date contact information, to participate in alternative dispute resolution mechanisms, and to submit to the jurisdiction of specified courts of law;
5. Registrar commitment to comply with minimal fair information practices related to notice, choice and access to personal information;
6. Registrar commitment to abide by a code of conduct and uniform dispute resolution mechanisms if adopted by ICANN consensus in accordance with articulated procedural safeguards including transparency; and
7. Registrar commitment to pay specified user fees adopted by ICANN consensus in accordance with articulated procedural safeguards.

and discuss with ICANN as they are received. For example, in response to a comment **from** the intellectual property community that the Accreditation Agreement should require registrars to conduct a reasonable degree of screening of registration data, to bolster the quality of data in WHOIS, ICANN revised the Accreditation Agreement to require registrars to abide by any **later-**adopted policies related to the verification of contact information.\*'

NSI has not, to date, executed an Accreditation Agreement nor agreed to provide registrar services in accordance with the substantive provisions of that agreement. We understand that NSI's objections fall into three categories: first, NSI asserts that ICANN has not been "recognized" by the Commerce Department and thus NSI is not obligated under Amendment 11 to execute any agreement with ICANN; second, NSI believes that ICANN Accreditation should be limited to an evaluation of the business and financial capacity of an applicant to be a registrar; and third, NSI objects to specific terms in the Accreditation Agreement.

With respect to the first objection, NSI has asserted that the MOU did not constitute "recognition" of ICANN. As we understand it, NSI's position appears to be that such recognition will not take place until the Department of Commerce transfers authority (as opposed to operational responsibility) over the root server system to ICANN. The White Paper contemplated a gradual transition to private sector management to ensure stability, and transfer of authority over the root would necessarily come at the end of any transition. Moreover, the transition described in the White Paper necessarily depends on NSI's early cooperation. To clear up any misunderstanding, the Department subsequently issued a letter to NSI specifically recognizing ICANN for purposes of Amendment 11.<sup>21</sup>

NSI has stated repeatedly that the ICANN Accreditation Agreement should be limited to an evaluation of the business and financial capacity of a would-be registrar. Indeed, previous Department efforts to facilitate a contractual agreement between NSI and ICANN were unsuccessful in late March of 1999 because NSI insisted that it would not enter into any contract with ICANN that did not specifically preclude the existence of separate contracts between ICANN and the Accredited Registrars. NSI proposed, instead, that ICANN should enter into a contract with NSI as registry, in which NSI would agree to "flow through" the substantive provisions of the Accreditation Agreement to Accredited Registrars. We understand NSI's position to be that this architecture **reflects** a more orderly contract hierarchy and avoids the possibility of conflicts between the terms of NSI's relationship with Accredited Registrars and the terms of **ICANN's** relationship with Accredited Registrars.

We agree that the "flow through" of terms from ICANN to NSI as registry and then to Accredited Registrars might, in some sense, be perceived to be more orderly. However, the architecture proposed by NSI undermines the fundamental premise of the White Paper -- that the DNS should be

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<sup>20</sup> WHOIS is the database of domain name registrant and registration information.

<sup>21</sup> Tab 11.

managed by the private sector based on voluntary contractual undertakings among interested stakeholders. In addition, this architecture interposes NSI between ICANN and the Accredited Registrars affected by ICANN policy development, in effect giving NSI a veto over any ICANN developed policy relating to registrars in .com, .net and .org. If, for example, ICANN were to promulgate a policy supported by consensus and developed in accordance with transparent and fair processes, as required by the ICANN bylaws, meaningful implementation of that policy would be entirely up to NSI. The absence of contracts between ICANN and its Accredited Registrars also removes any mechanism whereby ICANN and Accredited Registrars could provide for the payment of registrar user fees. Presumably such fees would instead come **from** the registry, giving NSI considerable leverage over ICANN's finances. Nothing in the White Paper or Cooperative Agreement contemplates that NSI is to have such control.

We understand that NSI's objections to specific provisions of the Accreditation Agreement flow **from** a concern about creeping regulatory authority. We note that the scope of ICANN's authority is bounded by its bylaws, which set out the purpose of the corporation, the processes it must follow when pursuing these goals, and the need for consensus on the specific approach adopted to pursue these goals. We also believe that antitrust law also constrains ICANN policy development to that which is reasonably necessary to achieve the legitimate goals of the corporation, in a manner that is no broader than necessary to achieve those goals.

Nonetheless, we believe it would be constructive to have a clearer articulation of the limits of ICANN's authority. For these reasons we have urged the Board to assure registrars and registries, including NSI, through contract, that ICANN will restrict its policy development to matters that are reasonably necessary to achieve the goals specified in the White Paper, in accordance with the principles of fairness, transparency and bottom-up decision making articulated in the White Paper. This commitment would, in effect, give all who enter into agreements with ICANN a contractual right to enforce safeguards that are now contained in the ICANN bylaws and in the antitrust laws of the United States.

We are also prepared to discuss any other concerns that NSI has with the terms of the existing Accreditation Agreement.

NSI has also publicly stated that ICANN's rules should apply to all similarly situated top level domains – which is to say ccTLDs that do not require a meaningful connection to the jurisdiction associated with the TLD or the registrant's agreement to submit to and be bound by the courts of that jurisdiction (so-called "Open ccTLDs"). There may be some merit to this view, and it deserves further consideration. Open ccTLDs potentially provide competition for .com, .net and .org and thus their coverage could become a basic fairness issue at some point, although currently registrations in .com, .net and .org dwarf registrations in even the most popular ccTLDs, whether open or closed. Moreover, we believe that the smooth operation of the Internet will be enhanced by greater clarity about what rules apply in a given situation. The White Paper strongly endorsed the principle, however, that national governments should continue to have policy authority over their ccTLDs. Thus, the United States has initiated discussions within the ICANN Governmental Advisory Committee (GAC) in an effort to secure international, governmental support for the proposition that

Open ccTLDs should be subject to the same rules applicable to gTLDs. This process will take time, however, and its outcome is not under ICANN's control. It therefore provides no basis for an interim exemption of .com, .net, and .org from policies developed in accordance with the White Paper.

The hardest, and most important, task we face at this point is to create an atmosphere of greater trust and cooperation in implementation of the White Paper. The Department of Commerce believes that all interests will be served by eliminating the level of inflammatory rhetoric being currently displayed on all sides. The stakes here are too great – nothing less than allowing the Internet to realize its full potential as a vehicle for comment, education, and commerce. We all must put aside parochial concerns and work toward that end.

We have been able to reach agreement with NSI in the past each time it has been necessary to do so in order to enable the DNS process to move forward. There is no reason to believe that agreement cannot be reached on the remaining questions. Our discussions with NSI are ongoing, and we are hopeful that they will advance to a satisfactory resolution on a timely basis.

What if an agreement cannot be reached?

NSI's view is very clear. Its position is that when the Cooperative Agreement terminated, whether prematurely or upon its expiration on September 30, 2000, NSI will be free to operate these domains without any supervision by the Government:

- to charge whatever registration fee it wishes
- to discontinue accepting registrations from competing registrars
- to decide whether, and on what terms, to make WHOIS and zone file data available to intellectual property owners seeking to fight piracy, and to anyone else
- to decide whether or not to provide a dispute resolution system for trademark infringement
- to unilaterally determine how the .com, .net, and .org functions are managed globally
- to decide whether or not registrants should pay for a domain name before it is activated
- to decide whether domain names are registered on a first-come, first-served basis, or on some other basis<sup>22</sup>

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<sup>22</sup> Of course, NSI's conduct would be subject to the Federal antitrust laws. But antitrust actions are complex and expensive and offer an uncertain outcome, often after lengthy delay. Here, where the risk of harm to consumers is great, we should not – and we will not – pass up the opportunity to ensure through these negotiations that consumers are able to reap the

The Commerce Department believes just as strongly that NSI does not have the legal right to operate these domains as it wishes in the authoritative root in perpetuity. We believe that the functions now performed by NSI under the Cooperative Agreement could be reassigned through a recompetition of those tasks. Upon such reassignment, NSI would cease to have any legal right to provide either registry or registrar services in the authoritative root, unless it won the competition – and provided those services under the terms of the new agreement – or provides registration services through an agreement with ICANN.

More fundamentally, **from** a policy perspective, NSI's position has disturbing implications for the future of the Internet:

- a. Will companies be willing to continue to invest in new Internet applications if entry to the only commercially relevant domains is under the unsupervised control of one company?
- b. Will intellectual property firms be willing to digitize their content and distribute it over the Internet if their ability to combat piracy depends on the unsupervised decision of one company about whether to make available information about the location and ownership of web sites?
- c. Will companies be willing to invest in new trademarks, or bring existing marks to the Internet if their ability to effectively enforce their trademark rights rests in the unsupervised discretion of one company?
- d. Will companies be willing to invest in new technology that could enhance the Internet if the decision to deploy such technology rests in the unsupervised discretion of one company?

Even if the Department of Commerce did not intervene to prevent this result, we believe it is very clear that other countries would step in to impose limitations on NSI. During the comment process that culminated in the issuance of the White Paper, other governments were very forceful with respect to the need to introduce real competition and impose constraints on NSI. Without an appropriate outcome in the present negotiations, we believe NSI would quickly become a target of action by other countries in order to protect consumers against the exercise of monopoly power.

For these reasons, we think it clear that – one way or the other – NSI's provision of registry and registrar services will eventually be subject to reasonable standards, spelled out in the White Paper and in Amendment 11, to ensure the full and fair competition that will lead to lower prices and greater consumer choice. Obviously, failure to reach agreement with ICANN, recompetition of the Cooperative Agreement, and the likely results that would follow, together with action by other governments, will be extremely destabilizing for the Internet and therefore quite harmful to its development. We therefore believe that it is in everyone's interest – the Internet community, NSI, ICANN, and the United States to resolve these issues amicably, reasonably, and in a manner that promotes the consensus policy goals of the White Paper. We plan to do everything we can to reach

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full benefits of robust competition.

that result.

**b. *The Commerce Department and NSI must agree on a post-Testbed license for use of the SRS by Accredited Registrars***

As discussed above, the Commerce Department and NSI have not yet reached agreement on a post-Testbed license for use of the SRS. Following are the principal issues under discussion:

- The SRS requires all registrants in .com, .net and .org to register a domain name for an initial two-year term. The Department of Commerce believes that, at a minimum, NSI should provide a one-year registration option to allow registrars to compete for business on the basis of different term lengths.
- Under the SRS, transfer of a domain name from one registrar to another has the effect of terminating the remainder of an existing registration, and requiring registrants to pay for a new two year term. Thus, if a consumer elects to change registrars six months into an existing registration contract, he or she gets no credit for the remaining 18 months of the existing registry entry, despite his or her previous payment for a full two-year term. Rather, a new two year fee must be paid to NSI upon transfer. We are very concerned that imposing this monetary penalty on transfers of existing registrations among registrars creates a barrier to robust competition. The Department believes transferring registrants should not be required to forfeit their existing term, but rather should pay a transfer fee. Such a fee, in our opinion, should be cost based and should be low enough to facilitate growth of robust competition without encouraging “slamming.”<sup>23</sup>
- NSI and the Department have not agreed on a registration price that reflects NSI’s costs and a reasonable return on investment, as called for in Amendment 11. These discussions are continuing.
- Registrars accredited for the Testbed and for the post-Testbed period have indicated that the current transfer procedures are cumbersome and will discourage consumer choice. Procedures must be developed that facilitate consumer choice and competition without creating “slamming” problems.
- The requirement of a performance bond in the amount of \$100,000 has presented problems for registrars based outside the United States and for registrars with non-traditional business models. We are exploring with NSI flexible alternatives to the performance bond that provide adequate financial assurances to back up the indemnification provisions in NSI’s License and Agreement with Accredited Registrars.

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<sup>23</sup> For purposes of this discussion, “slamming” is the transfer of a domain name registration from one registrar to another without the authorization of the registrant.

- Accredited Registrars have expressed concern about NSI's assertion of rights under the Non-Disclosure Agreement (**NDA**) in the NSI License and Agreement. That NDA contains a standard exclusionary clause for, among other things, information in the public domain, prior known information, and independently developed information. Notwithstanding this exclusion, NSI has informed **Testbed** Registrars participating in a Registry **Testbed** Mail List that "all information included in [postings to the list] is subject to the Confidentiality Agreement ... and may not be sent to any third party ... without the express prior written consent of Network Solutions."<sup>24</sup>
- NSI has indicated that in the post-Testbed period, personnel resource limitations will **permit** the company to support the addition of new registrars at the rate of only five per month. We are concerned that this pace will delay the onset of full competition.\*'
- The **Testbed** period is providing important information about the competitive implications of NSI's continued participation in the system as both an exclusive provider of registry services and as a competing registrar in .com, .net and .org. For example, NSI's public **affairs** office (which serves both the registry and the registrar) announced the volume of registration activities conducted by one of the Accredited Registrars participating in the **Testbed**. NSI agrees that it should not have announced the business information of another party without its permission, and has taken steps to correct the problem, but this action raised questions about how to assure that information held by the registry is not shared with NSI as registrar to the detriment of fair and open competition.

### **c. Data and Competition Issues**

In February and March of this year, NSI implemented certain substantive changes in its provision of registration services. These actions, which have competitive implications, have not been resolved on a permanent basis.

- First, NSI denied bulk access to information in the .com, .net and .org zone files for any purpose other than caching. (NSI later agreed to permit bulk downloads for trademark searches.)
- Second, NSI blocked the date creation field in the **WHOIS** database and attempted to make access to all information in the **WHOIS** database subject to a license prohibiting any commercial use of the data.

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<sup>24</sup> Tab 12.

<sup>25</sup> Tab 13.

These actions were taken without the consent of the Department of **Commerce**.<sup>26</sup> Zone file and WHOIS data had been **freely** available to the Internet community for years. Numerous people have built legitimate businesses that enhance the Internet using **WHOIS** and zone file data, which was compiled by NSI while it operated under the authority of the United States Government, through the Cooperative Agreement, as the exclusive provider of registry and registrar services in the .com, .net and .org gTLDs. The White Paper specifically endorsed the continued availability of that data to “anyone who has access to the Internet.”

- Third, NSI directed all traffic addressed to [www.InterNic.net](http://www.InterNic.net) to its own registration page at [www.networksolutions.com](http://www.networksolutions.com). Again, this was done without notice to or the authorization of the Department of Commerce. **Internic** is a registered servicemark of the U.S. Government. Its operation is at the heart of the Cooperative Agreement. NSI’s decision to direct would-be domain name registrants directly to its own web page, one month before competition was to be introduced, was extremely troubling to the Department.

The Department and NSI have reached temporary resolutions of some of these issues.\*’ NSI restored the date creation field of **WHOIS**, pending further dialogue on “privacy considerations and operational risks associated with the display of a registrar’s record creation date.” We have yet to receive requested information on the operational risks that are the basis of NSI’s concerns. Most troubling was NSI’s statement that it wanted specifically to block competing registrars access to the date creation field to prevent “harassment” of registrants; that information obviously would be useful to new entrants seeking registration renewal business from the more than five million existing registrations. NSI’s commitment to display the date creation field expired on May 1. NSI has assured us only that it would not change the present functionality of **WHOIS** without informing us. NSI continues to assert a right to limit commercial use of the **WHOIS** data, over the Department’s objections.

NSI agreed to provide free bulk access to zone file data until July 23, 1999, under the terms of a Department of Commerce-approved agreement that would prohibit objectionable uses such as spamming but would allow all other lawful uses. The Department has asked the root server operators not to make this data available during the study period, and all of the operators have agreed.\*\* The Department of Commerce has not received information requested on the operational risks that form a basis for NSI’s concerns about access to zone file data.

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<sup>26</sup> This action prompted a Congressional inquiry. Tab 14.

<sup>27</sup> Tab 15. Notwithstanding these agreements, however, the Department believes that the original changes, and any future changes, require the authorization of the Department under the Cooperative Agreement.

<sup>28</sup> Tab 16.

NSI has now sought the Department's approval to effectively segregate zone file data for .com, .net and .org from the root servers and to house it on servers exclusively within NSI's control. The proposal is now under careful review. The NSI proposal has not been accompanied by any commitment to continue to make zone file data readily available to those with legitimate uses, including the Department of Commerce under the Cooperative Agreement, or a commitment regarding Department of Commerce supervision of the zone files pursuant to the Cooperative Agreement.

Finally, NSI agreed to create a page at [www.internic.net](http://www.internic.net) containing information explaining that competition among registrars in .com, .net and .org was coming. We were rather disappointed that NSI's implementation of this agreement involved a page that dissolved, in short order, to the NSI homepage. We expected a distinct web page with a link to NSI's homepage. Now that competing registrars are online, we have reiterated our view that a query to [www.internic.net](http://www.internic.net) should resolve to a page at a separate **website** with hot links to competing registrars, and we have offered to operate that page. For this change to be fully implemented, NSI may have to rewrite some registration templates used by some of its bulk resellers. Nonetheless, we think that InterNIC is, and should remain, a neutral designation and should be used to educate the public about the introduction of competition in domain name registration. It should not be used to point registration requests to one registrar on a preferential basis. In addition, the Department of Commerce believes that further consideration should be given to use of the InterNIC site to provide access to a comprehensive WHOIS database.

#### **D. Domain Names and Trademarks**

The White Paper included a lengthy discussion of what was referred to as the "trademark dilemma." The White Paper concluded, on the basis of substantial public input, that the smooth running of the DNS system and continued growth of the Internet required the development of systems to provide trademark holders with the same rights they have in the physical world, to ensure transparency, and to guarantee efficient dispute resolution mechanisms for certain categories of disputes. The specific policies recommended in connection with intellectual **property**/DNS conflicts include:

- that specific, up-to-date information, be collected **from** domain name registrants and be made available to anyone with access to the Internet.
- that domain name registrants pay registration fees at the time of registration or renewal and agree to submit to the authority of a court of law in specified jurisdictions.
- that domain name registrants agree, at the time of registration or renewal, to submit to and be bound by alternative dispute resolutions systems in cases involving cybersquating or cybersquatting.
- that domain name registrants agree, at the time of registration or renewal, to abide by processes designed to prevent certain famous trademarks **from** being used as domain names by anyone other than the holder of that famous mark.

The White Paper also indicated that the U.S. Government would seek international support to call upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent

process to develop recommendations for reducing and resolving trademark/domain name disputes.

The WIPO report issued in April 1999, is the product of nearly a **full** year of work involving public meetings in fourteen different countries, based on input **from 344 commenters**.<sup>29</sup> It also draws on extensive work done by WIPO prior to June 1998, as well as consensus reflected in the White Paper.

ICANN anticipated a substantial portion of the WIPO recommendations related to pre-payment and the need for up-to-date registrant contact information (most of which were identified in the White Paper as well), and addressed these recommendations in the Accreditation Guidelines, which, as previously mentioned, were the subject of public consultation by ICANN in February of this year. ICANN acted on the remainder of the WIPO recommendations by (1) embracing the concept of a uniform administrative dispute resolution procedure for cybersquatting (a concept that was specifically recommended in the White Paper) and calling on the DNSO to report on implementation of these recommendations in advance of the August Board meeting, and (2) referring the WIPO recommendations on protections for famous marks to the DNSO for further study.

The referral to the DNSO is appropriate under the ICANN Bylaws, which require policy consensus development to be conducted on a bottom-up basis. We note, however, that both the White Paper process and the WIPO process demonstrated nearly universal support for a uniform dispute resolution policy for cybersquatting. Inasmuch as competing registrars are already entering the system, such procedures must be developed quickly. We are thus especially pleased that a group of ICANN Accredited Registrars are working together on their own to develop a uniform dispute resolution policy that will incorporate the WIPO recommendations.

#### **E.        Management of the Root Server System**

The first principle of the White Paper, stability, requires the U.S. Government to transition the management of the Internet name and number addressing system in a manner that insures the stability of the Internet. We are committed to introducing new private sector management without disrupting current operations or splitting the Internet through creation of competing root systems. The White Paper called for the United States to undertake, in cooperation with IANA, NSI, the Internet Architecture Board and other relevant organizations from the public and private sector, a review of the root server system to recommend means to increase the security and professional management of the system.

Many are concerned that as the Internet has grown, operation of the root server system has remained **ad hoc**, in that it continues to be administered by “volunteers” who are not bound by any legal obligation to work together. We note that the so-called “volunteers” are, in fact, extremely reputable and highly skilled networking specialists who have, over the years, demonstrated an ability to work cooperatively and under tremendous pressure to ensure the stability of the root server system.

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<sup>29</sup>        The WIPO report is available on the Internet at [www.wipo.int](http://www.wipo.int).

The Department of Commerce and ICANN have entered into a Cooperative Research and Development Agreement (**CRADA**) to fulfill the White Paper mandate and carry out one of the objectives in the MOU with ICANN -- to increase the security and professional management of the system.<sup>30</sup> We also note the creation within the **IETF** of a working group on this matter. To this end, we are collaborating on the development of written technical procedures for operation of the primary root server and for making the root server system more robust and secure. This initiative represents an important first step in the creation of formalized relationships for administration of the Internet root system.

Currently, NSI manages the authoritative or "A" root server at the direction of the Department of Commerce. The Cooperative Agreement provides that (1) all changes to the "A" root must be approved by the Department and (2) NSI will transfer management of the root to ICANN or an alternative entity upon receipt of written instructions.

The White Paper and the MOU also specifically contemplate transfer of root administration to ICANN. The Department and ICANN are discussing transfer of operational responsibility (but not policy authority) for the "A" or authoritative root server to ICANN. These discussions are informed on an ongoing basis by input from ICANN's Root Server Advisory Committee, in which NSI participates.

We stress that these conversations are preliminary. The prerequisites for any such transfer include (1) the existence of a technical management plan that ensures the secure and stable operation of the authoritative root and (2) a binding contractual obligation on the part of ICANN to operate the authoritative root server at the direction of the United States government. ICANN is currently developing a technical management plan. Neither the Department of Commerce nor, to our knowledge ICANN, has drafted a contract for ICANN's administration of the "A" root server. To the extent that it is consistent with the security and stability of the Internet, the Department will seek private sector input on the plan, when developed.

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For ease of reference, the questions contained in your June 22 letter appear in italics, and the responses in plain text below. Pursuant to an agreement with the Committee's staff, requested documents will be provided under separate cover on July 12, 1999.

*1. As stated above, it has been reported that during the most recent ICANN board meeting in Berlin last month, the interim board threatened to terminate the authority of NSI to continue registering domain names if NSI fails to enter into a registrar accreditation agreement with ICANN by June 25, 1999. Regarding this reported exchange during ICANN's board meeting:*

- a. *Did a member of ICANN's interim board threaten to terminate the authority of NSI to*

*continue registering domain names if NSI fails to enter into a registrar accreditation agreement with ICANN by June 25, 1999? If so, please **identify** the interim board member in question.*

- b. Why did the **NTIA official present** at the meeting fail to discourage such a drastic measure by **ICANN**?*
- c. Does **ICANN currently** possess the authority to terminate the authority of **NSI** to register domain names?*

Mr. George Conrades did ask a Network Solutions representative, David Johnson, if he had stated that Network Solutions “would never” sign an accreditation agreement, as several participants in the registrar constituency meeting had reported. Following Mr. Johnson’s response, which was contested by several participants, Mr. Conrades indicated that if Network Solutions did not sign an accreditation agreement it would not be a registrar. ICANN does not have the authority to terminate NSI’s “authority” to continue registering domain names, and Mr. Conrades did not assert that ICANN had such authority. We believe that this exchange reflects the frustration and lack of trust described above. We have urged ICANN to avoid further exchanges of this sort.

Representatives of the National Telecommunications and Information Administration (**NTIA**) and the Patent and Trademark Office (**PTO**) attended the ICANN open meeting in Berlin on May 25-27, 1999. The United States Government’s participation in these meetings is generally limited to observing, in keeping with our commitment to private, bottom-up decision-making. Becky Burr, Acting Associate Administrator for International Affairs, NTIA, responded to a specific question on this topic from Mr. Conrades, declining to comment on his views, but indicating that Amendment 11 clearly contemplates that Network Solutions will need to be accredited at some date in the future and that signing an accreditation agreement with ICANN is at present the only way to become an Accredited Registrar. She made no statement about what would happen if Network Solutions refused to enter into a contract with ICANN. In subsequent public meetings, Ms. Burr has indicated that ICANN has no authority to limit NSI’s registration activities. It should be noted that ICANN staff and Board members have also affirmatively indicated that they do not possess such authority.

ICANN does not possess the authority to terminate the authority of NSI to register domain names. NSI provides DNS registration services pursuant to a Cooperative Agreement with the United States Department of Commerce. In that Agreement, NSI agreed to recognize ICANN’s authority and to become accredited pursuant to a contract with ICANN.

NSI has indicated during discussions with the Commerce Department that it believes that the United States Government does not have the authority to terminate Network Solutions’ ability to register domain names. The Commerce Department believes that it does have the legal authority to terminate provision of registrar and/or registry services in the authoritative root by NSI by **recompeting** the relevant portions of the Cooperative Agreement. These services then would be provided by the winner of the competition (which could be NSI, if it were the winner and were willing to comply with the provisions of the revised Cooperative Agreement). Network Solutions’

contrary view, of course, would mean that Network Solutions could manage the .com, .net, and .org domains in perpetuity without any oversight or supervision by the US Government.

2. a. *Did ICANN consult with the Department of Commerce regarding ICANN's decision to impose a **\$1** per domain registration fee?*
- b. *Did the Department of **Commerce** conduct any legal analysis relating to ICANN's authority to impose a \$1 per domain **name** fee? If the Department of **Commerce** did conduct such a legal analysis, please **provide** all records relating to the aforementioned legal analysis. If the Department of **Commerce** did not conduct such a legal analysis, please provide a detailed legal analysis of ICANN's authority to impose a **\$1** per domain name fee, including but not limited to the following questions:*
  - i. *Is it the legal opinion of the Department of **Commerce** that ICANN is legally empowered to impose such a fee?*
  - ii. *If so, does ICANN derive the authority to impose a \$1 per domain **name** fee from its MOU with the Department of **Commerce**?*
- c. *Does the Department of **Commerce** approve of ICANN imposing such a fee?*

The Department of Commerce received advance copies of the Registrar Accreditation Guidelines, posted for comment by ICANN on February 8, 1999, and discussed them with ICANN counsel. Department staff asked ICANN counsel how both the fixed and variable portions of the fees were derived, and how those fees related to ICANN's overall budget process, described in the bylaws. We were informed that ICANN intended to establish fees using the budget process, and to collect such fees via contractual arrangements with registrars, registries and others, as appropriate.

The Department of Commerce did not conduct a detailed legal analysis of ICANN's authority to impose the \$1 fee as such fee was not designed to collect funds for government use. As discussed above, Commerce Department staff did direct certain inquiries to ICANN's counsel regarding the fees.

It is, however, the Department of Commerce's view that ICANN is legally empowered to impose such a fee. OMB Circular A-25, ICANN recognizes that ICANN, as a project partner with the Department of Commerce, can recover its cost of participating in a joint project, but only the actual costs associated with its participation in the joint project. Thus, the Department has no objection to ICANN's recovery of costs associated with the joint project, provided that only joint project expenses are recovered and no profits obtained.

The Department also believes that such a fee would be consistent with the White Paper and the MOU between the Department and ICANN. The White Paper called upon the private sector to create a new, not-for-profit corporation, funded "by domain name registries, regional IP registries, or other entities identified by the Board." Under the MOU between the Department and ICANN, ICANN is required to **defray** its own expenses. The ICANN bylaws require the Board to set fees and

charges, subject to rigorous procedural safeguards also set out in the bylaws, “**with** the goal of fully recovering the reasonable costs of the operation of the Corporation and establishing reasonable reserves and contingencies reasonably related to the legitimate activities of the Corporation. Such fees and charges shall be fair and equitable, and once adopted shall be published on the Web Site in a sufficiently detailed manner so as to be readily accessible.” (Bylaws, Section 4.(b)).

Nonetheless, as indicated above, we believe that ICANN should eliminate this fee until the election of board members from the **SOs**. Our recommendation in this regard reflects the practical judgment that this important decision should not be made until elected members are present on the Board. It does not reflect a legal judgment that the fee is unauthorized or unlawful.

3. *A detailed legal analysis of:*

- a. *The Department of Commerce’s authority to empower ICANN;*
- b. *The nature and scope of oversight authority available to the Department of Commerce under its **MOU** with ICANN; and*
- c. *Whether the Department of Commerce’s cooperative agreement with NSI requires NSI to sign a registrar accreditation agreement with **ICANN**.*

The Department has authorized ICANN to participate in DNS management activities in two separate agreements. On November 25, 1998, following consultation with the private sector and with other governments, the Department of Commerce entered into a joint project agreement with ICANN. Under the agreement, ICANN and the Department are collaborating to design, develop and test mechanisms for private sector management of DNS. To enter into this agreement, each party identified its mission authority to participate in these activities. Just as the Department has statutory authorization to accomplish this mission, ICANN is also chartered in its articles of incorporation and bylaws to pursue DNS management activities.

Most of the Department’s work with ICANN falls under the joint project agreement. As discussed below, however, the Department has entered a **CRADA** with ICANN and intends to enter into a separate contract whereby ICANN will perform key Internet technical coordinating functions (collectively known as the Internet Assigned Numbers Authority (**IANA**) functions), currently performed under a contract between the Defense Advanced Research Projects Agency @ARPA) and the University of Southern California (USC). Pursuant to these agreements, ICANN is authorized to participate in the Government’s DNS management activities.

DARPA and NSF, as well as other Federal agencies, in accordance with their missions, have all participated and maintained a central role in the development and management of the DNS. Through **contrancts**, cooperative agreements, and other transactions, the United States Government has conducted research, development, and technical management of the DNS. The White Paper sets forth the principles that govern the exercise of the U.S. Government involvement in this area. As set forth in the White Paper, the Department of Commerce is continuing this management role by entering into agreements with ICANN.

The Department of Commerce has broad authority to foster, promote and develop foreign and domestic commerce. 15 U.S.C. § 1512. Moreover, the National Telecommunications and Information Administration is specifically authorized to coordinate the telecommunications activities of the Executive Branch and assist in the formulation of standards and policies for these activities, including, but not limited to, considerations of interoperability, privacy, security, spectrum use and emergency readiness. 47 U.S.C. § 902 (b)(2)(H).

The Department's Joint Project Authority, 15 U.S.C. § 1525, permits the Secretary of Commerce to enter into agreements with research organizations, non-profit entities and public agencies to conduct joint projects on matters of mutual interests, provided that the costs are equitably apportioned. The Department sought, and has achieved, a relationship whereby the joint project partner can test the mechanisms for private sector management of the DNS, including those addressed in the White Paper.

ICANN's responsibility under the joint project agreement is to act as the not-for-profit entity contemplated in the White Paper, and to demonstrate whether such an entity can implement the goals of the White Paper. If it cannot, Government involvement in DNS management would likely need to be extended until such time as a reliable mechanism can be established to meet those goals. The Department does not oversee ICANN's daily operations. The Department's general oversight authority is broad, and, if necessary, the Department could terminate the agreement and ICANN's role in this aspect of DNS management with 120 days notice.

The White Paper stated that the private sector come together to create a non-profit corporation to ultimately manage the DNS functions. Despite press reports to the contrary, the Department did not create, and does not control ICANN. The Department did not draft corporate by-laws for ICANN nor select members of its board of directors. The Department did suggest that ICANN work with the Internet community to resolve concerns raised by ICANN's initial proposal to the Department in response to the White Paper. The Department has been careful not to interfere in the internal affairs of ICANN. The Department's general oversight under the joint project is limited to ensuring that ICANN's activities are in accordance with the joint project MOU, which in turn requires ICANN to perform its MOU tasks in accordance with the White Paper.

At the time that the Department and Network Solutions entered into Amendment 11 of the Cooperative Agreement, the Department had not recognized the new, not-for-profit corporation called for in the White Paper. For this reason, the Amendment refers to "NewCo" as the "not-for-profit corporation described in the Statement of Policy and recognized by the USG in accordance with the provisions of the Statement of Policy for so long as the USG continues its recognition of NewCo." (General Definition of NewCo clause.)

Network Solutions agreed, in Amendment 11, to recognize NewCo "when recognized by the USG in accordance with the provisions of the Statement of Policy." (Purpose clause.) Network Solutions further committed to enter into a contract with NewCo, and acknowledged "that NewCo will have the authority, consistent with the provisions of the Statement of Policy and the agreement between the USG and NewCo, to carry out NewCo's Responsibilities." (NewCo Clause.) Under Amendment

11, NewCo's Responsibilities specifically include the establishment and implementation of DNS policy and the terms, including licensing terms, applicable to new and existing gTLDs and registries under which registries, registrars and gTLDs are permitted to operate." (Assistance to NewCo clause and "Transition" Section of White Paper.)

Network Solutions has indicated that it is not obligated to enter into a contract with ICANN because the Department of Commerce has not "recognized" ICANN by transferring authority over the authoritative root system to it. We find no merit in this argument. The Department of Commerce entered into a Memorandum of Understanding with ICANN on November 25, 1998. That MOU constitutes the Government's "recognition" of ICANN. We reiterated this point in a letter to Network Solutions on February 26, 1999. When Network Solutions signed Amendment 11 on October 7, 1998, no one contemplated that either "operational responsibility" (let alone "authority") over the Internet root would be transferred outside the United States Government in the short term. Under the White Paper, the Government proposed to "gradually transfer these (coordination) functions to the new corporation . . . with the goal of having the new corporation carry out operational responsibility by October 1998." (White Paper Section 4.) Moreover, in Amendment 11, NSI agreed "to continue to function as the administrator for the primary root server for the root server system and as a root zone administrator until such time as the USG instructs NSI in writing to transfer either or both of these functions to NewCo or a specified alternate entity." (Root Servers Clause) This administrative function specifically provided 'NSI to process any such changes (additions or deletions to the root zone file) directed by NewCo when submitted to NSI in conformity with written procedures established by NewCo and recognized by the USG." (Same)

Amendment 11 unambiguously contemplates a contract between NSI and ICANN under which NSI will recognize that ICANN has the authority to carry out its responsibilities under the White Paper and ICANN will accredit NSI as a registrar and registry. These parties have not yet reached agreement on the terms of that contract. As we have discussed, we believe it is clear that the terms must be consistent with the policies set forth in the White Paper and, in particular, with the policy mandating robust competition in the provision of registrar services.

As discussed above, we have every hope that these parties will be able to reach agreement. We plan to do everything we can to facilitate such an agreement.

4. *Records of all communications (whether written, electronic or oral) between the Department of Commerce (or its agents or representatives) and ICANN (or its agent or representatives), including but not limited to all records relating to such communications, regarding:*

- a. *Negotiations or other discussions regarding the transfer of control of the root system to ICANN or an ICANN-affiliated entity*
- b. *Negotiations or other discussions regarding future agreements relating to the DNS between ICANN and the Department of Commerce) excluding records of communications provided in response to request 4.a. above)*
- c. *The terms of ICANN's registrar accreditation agreement, including but not limited to the imposition of the \$1 per domain name registration fee*

- d. *Termination or alteration of the Department of Commerce's cooperative agreement with **NSI**; and*
- e. *Attempts to persuade or force NSI into entering a registrar accreditation agreement with **ICANN**, or **NSI's refusal** to enter into the aforementioned agreement.*

The Department of Commerce has no intention of transferring control over the root system to ICANN at this time. We have had preliminary conversations relating to ICANN's operation of the authoritative root under terms and conditions similar to those by which the A root is operated by NSI currently.

The MOU and the **CRADA** constitute the only existing agreements between ICANN and the Department of Commerce.

With respect to future agreements, two are currently contemplated:

The Department has developed a sole source contract/request for proposal <sup>31</sup> for ICANN's provisions of a limited number of purely technical services, previously provided under a contract between DARPA and the University of Southern California's Information Sciences Institute (**ISI**). An initial notice was posted in *Commerce Business Daily* on January 4, 1999, as required under 41 U.S.C. 253 (Federal Procurement Regulations). In response to public input, the CBD notice was revised and reposted on February 9, 1999. The proposed contract does not authorize ICANN to **make** any substantive changes in existing policy associated with the performance of the **IANA** functions. No protests or expressions of interest were received in response to the revised CBD Notice. We are currently awaiting a technical and business proposal **from** ICANN as well as various representations and certifications required under federal procurement statutes and regulations.

If and when the Department of Commerce transfers operational responsibility for the authoritative root server for the root server system to ICANN, an separate contract would be required to obligate ICANN to operate the authoritative root under the direction of the United States government. As discussed above, these obligations would mirror the obligations under which NSI currently operates the A root server.

As discussed above, Department **staff reviewed** and commented on advance copies of the Registrar Accreditation Guidelines. Department staff suggested certain changes in the guidelines, and urged ICANN to include a series of questions designed to elicit public input on the matters addressed. ICANN staff implemented this and other suggestions. Department staff also facilitated a meeting between ICANN and NSI to discuss NSI's objections to the terms of the Accreditation Guidelines and the Accreditation Agreement. The Department also received, and conveyed to ICANN, input **from** members of the intellectual property community with respect to the Agreement. In both cases, ICANN revised its Accreditation Agreement based on the input received.

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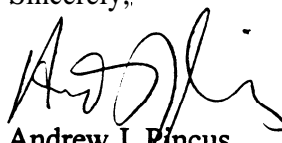
<sup>31</sup> Tab 18.

In February and March of this year, Commerce Department staff attempted to facilitate the NSI and ICANN contract negotiations. These discussions focused on two agreements, one relating to NSI's registrar activities, and one relating to NSI's activities as the registry for .com, .net and .org. Although some progress was made in the course of these informal discussions, NSI's refusal to consider any arrangement that permitted the existence of a contractual relationship between ICANN and ICANN Accredited Registrars effectively ended the effort at that time. NSI and Department staff are currently engaged in intensive discussions on the subject of the ICANN/NSI relationship.

5. *All records relating to **the** proceedings of the Government Advisory Committee to ICANN*

Responsive records will be provided under separate cover.

Sincerely,



Andrew J. Pincus

cc: The Honorable John D. Dingell  
Ranking Member